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May 23, 1989

The Honorable Bruce A. Reeves  
Monterey County Assessor  
P.O. Box 570, Courthouse  
Salinas, CA 93902

Attention Mr. Bill Tibbetts, Appraiser

Re: Estate of Elizabeth Sherman, Deceased

Dear Mr. Reeves:

This is in response to your letter to me of April 20, 1989 in which you request our opinion concerning the change in ownership implications of the following facts contained in your letter and attachments thereto.

By letter of March 27, 1989 we advised you that under the will of the above-referenced decedent, one received a life estate in certain real property which resulted in a change in ownership in such real property. We concluded that a life estate was created by decedent's will notwithstanding the fact that right would terminate immediately in the event he attempted to assign, sublet, transfer, convey, encumber, share the right or cease to occupy the property. On termination by death or otherwise, decedent's children would become entitled to possession of the property. Apparently, resided in the property rent-free after the decedent's death as he was entitled to do under decedent's will.

A copy of our letter of March 27, 1989 was forwarded to the attorney for the estate. Thereafter, you were advised by the estate's attorney that had executed an Affidavit--Release of Possessory Life Estate dated March 29, 1989. That document recites that "he has now decided to reside elsewhere and release his possessory life interest in said property; and that by this affidavit he terminates any interest he might have in and to said real property. . . ."

Based on the foregoing facts, you first ask the following question:

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Does the fact that \_\_\_\_\_ signed a release or the fact that when the estate closes it will reflect title passing directly from decedent to her children result in her children's interest being eligible for exclusion from reassessment under Proposition 58 effective on decedent's date of death?

In our letter of March 27, we advised you that a change in ownership occurred when \_\_\_\_\_ life estate was created under decedent's will. In such cases, the date of the change in ownership is the date of death of decedent and not the date of the court order or decree distributing the property. (Prop. Tax Rule 462(n)(3).) Thus, \_\_\_\_\_ release cannot alter the fact that at the date of death he received a life estate in real property under decedent's will which resulted in a change in ownership at that time.

If, however, the document executed by \_\_\_\_\_ legally can be characterized as a disclaimer, the interest disclaimed, subject to exceptions not here relevant, shall descend and be distributed as if the disclaimant had predeceased the decedent and such disclaimer relates back for all purposes to the date of death of the creator of the disclaimed interest. (Prob. Code § 282.) In that event, the interest disclaimed would be deemed to pass from decedent to her children as of the date of death and Proposition 58 and Revenue and Taxation Code section 63.1 would be applicable as of that time.

Probate Code section 265 defines a "disclaimer" as any writing which declines, refuses, renounces, or disclaims any interest that would otherwise be taken by a beneficiary. "Beneficiary" means the person entitled, but for the person's disclaimer to take an interest. (Prob. Code § 262.) A "disclaimant" means a beneficiary who executes a disclaimer on his own behalf or a person who executes a disclaimer on behalf of a beneficiary. (Prob. Code § 264.) "Interest" includes the whole of any property, real or personal, legal or equitable, or any fractional part, share, or particular portion thereof, or any estate in such property and includes an interest created under a will. (Prob. Code § 267.) A beneficiary may disclaim any interest, in whole or in part, by filing a disclaimer as provided in Division 2 of the Probate Code (§§ 260-295). (Prob. Code § 275.) The disclaimer shall be in writing, shall be signed by the disclaimant and shall: a) identify the creator of the interest, b) describe the interest disclaimed, and c) state the disclaimer and the extent thereof. (Prob. Code § 278.) To be effective, a disclaimer shall be filed within a reasonable time after the person able to disclaim acquires knowledge of the interest. A disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after the death of the

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decedent with respect to an interest created under a will. If not, the disclaimant has the burden of establishing that the disclaimer was filed within a reasonable time after the disclaimant acquired knowledge of the interest. (Prob. Code § 279.) A disclaimer shall be filed with the superior court in the county in which the estate of the decedent is administered, the personal representative or any other person having custody or possession of or legal title to the interest. (Prob. Code § 280.) A disclaimer may not be made after the beneficiary has accepted the interest sought to be disclaimed. (Prob. Code § 285(a).) A beneficiary has accepted an interest if he makes a voluntary assignment, conveyance, encumbrance, pledge or transfer of the interest or otherwise accepts the interest or benefit thereunder. (Prob. Code § 285(b).) Division 2 of the Probate Code does not limit or abridge any right a person may have under any other law to assign, convey, or release any property or interest, but after December 31, 1983, an interest that would otherwise be taken by a beneficiary may be declined, refused, renounced or disclaimed only as provided in Division 2.

Since a disclaimer can be any writing which declines, refuses, renounces, or disclaims, the fact that a writing is called a "Release" would not necessarily preclude its characterization as a disclaimer as long as the writing otherwise qualifies as a disclaimer. Although it does not appear that the "Release" was filed as required by Probate Code section 280, that requirement could still be complied with and possibly within nine months of decedent's death in which case it would conclusively be presumed to be timely under Probate Code section 279. If properly filed but not within nine months of decedent's death, it may still be timely but —  
— would have the burden of proving it was filed within a reasonable time. The biggest potential obstacle to characterizing the document as a disclaimer, however, is the question of whether —  
accepted the interest. If he did, he is precluded from disclaiming. As indicated above, a beneficiary has accepted an interest if he makes a voluntary assignment, conveyance, encumbrance, pledge or transfer of the interest or otherwise accepts the interest or benefit thereunder.

Since —  
since decedent's death as he was entitled to do under decedent's will, he has, in our opinion, accepted the interest pursuant to Probate Code section 285 and is thereby precluded from disclaiming. Moreover, if he received consideration for his Release, we believe that would also constitute acceptance of "the interest or benefit thereunder" and preclude disclaiming under Probate Code section 285. See also Internal Revenue Code section 2518 and Treasury Reg. 25.2518-2(d), copies of which are enclosed for your easy reference.

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Since it appears that \_\_\_\_\_ has accepted the interest given him under decedent's will, then he has not disclaimed the interest and a change in ownership occurred at decedent's death. —

Your next question is if there is a change in ownership when the property passes to \_\_\_\_\_ is there another change in ownership when the children take the property as a result of Mr. \_\_\_\_\_ Release or does Proposition 58 apply? —

Revenue and Taxation Code section 61(f) provides that subject to certain exceptions, any vesting of the right to possession or enjoyment of a remainder interest which occurs on the termination of a life estate is a change in ownership.

We have taken the position for purposes of Proposition 58 and Revenue and Taxation Code section 63.1 that when a life estate terminates on the death of a life tenant and the remainder interest becomes possessory, the transfer is between the transferor of the remainder interest and the remaindermen rather than between the life tenant and the remaindermen.

Here, decedent provided in her will that \_\_\_\_\_ life estate would terminate immediately if he attempted to assign, sublet, transfer, convey, encumber, share or ceased to occupy the property. Decedent also provided that on termination of the interest by death or otherwise, her children would receive the property. \_\_\_\_\_ through his Release, has terminated his life estate in legal effect no differently than his death would have. Accordingly, the transfer should, in our opinion, be treated as between parent and children. The date of such transfer is rebuttably presumed to be the date of recordation of the Release pursuant to Property Tax Rule 462(n)(1)(A). —

If we can be of further assistance in this matter, please let us know.

Very truly yours,



Eric F. Eisenlauer  
Tax Counsel

EFE:cb  
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cc: Mr. John W. Hagerty  
Mr. Robert H. Gustafson  
Mr. Verne Walton